

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC Separate)	WC Docket No. 02-112
Affiliate and Related Requirements)	

**COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

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EXECUTIVE SUMMARY

The Competitive Telecommunications Association urges the Federal Communications to extend the separate affiliate, structural/transactional, non-discrimination, and audit requirements in Section 272 of the Telecommunications Act of 1996 beyond the three-year sunset deadline in Section 272(f)(1). Specifically, these requirements should be extended for an additional three years beyond the date that the RBOC is authorized to provide in-region interLATA telecommunications services. This course of action is justified by evidence showing that the Regional Bell Operating Companies (“RBOCs”) continue to leverage their power in the local market to gain advantages in the long distance market, as demonstrated by the RBOCs’ declining performance in the provision and maintenance of special access services and the processing of preferred interexchange carrier (“PIC”) freezes. CompTel further urges the Commission to immediately make an unredacted copy of the *SBC Section 272 Biennial Audit Report* publicly available. Without access to complete audit results, CompTel and its members are materially impaired in their ability to prepare comments in this proceeding and in response to the Commission’s *Special Access NPRM*. Finally, the Commission should provide interested parties with the opportunity to review the *SBC Section 272 Biennial Audit Report* and supplement the record in this proceeding with their analysis of the audit results. As such, the Commission should extend the Section 272 requirements in the State of New York beyond December 22, 2002, the date upon which they are currently scheduled to expire absent Commission intervention, to develop a more complete record and avoid prejudicing parties who could be harmed by the outcome of this proceeding.

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The Competitive Telecommunications Association (“CompTel”) hereby submits its comments on the Federal Communications Commission’s (“FCC”) Notice of Proposed Rulemaking (“NPRM”) regarding the sunset of the statutory requirements under Section 272. Section 272 of the Act requires Regional Bell Operating Companies (“RBOCs”) to provide in-region interLATA telecommunications services through a separate affiliate after they comply with the market-opening provisions of Section 271. Section 272 also imposes nondiscrimination and other safeguards and requires a biennial audit of an RBOC’s compliance with these requirements. According to Section 272(f)(1), these requirements expire three years after the RBOC is permitted to provide in-region interLATA services unless the Commission extends the application of these safeguards.

The Commission seeks comment on whether it should extend the requirements in

Section 272 or permit them to sunset after three years. The Commission also seeks comment on whether alternative safeguards should be implemented in states where the requirements of Section 272 have expired. This rulemaking is timely because without Commission intervention, Verizon will no longer be required to comply with the provisions of Section 272 in New York as of December 22, 2002.

As stated in the comments, CompTel believes that the Commission should extend the existing Section 272 requirements in New York and all other states where the RBOC has been permitted to enter the in-region interLATA services market for a minimum period of three years, though five years would more likely be appropriate. This is because local competition has been slow to develop, permitting the RBOCs to abuse their near monopoly in the local market to gain advantages in the long distance market. More specifically, CompTel's comments provide evidence of a continuing pattern of RBOC discrimination and cost misallocation that warrants an extension of the safeguards in Section 272.

Therefore, despite the impending expiration of Section 272 in New York, CompTel urges the Commission to devote significant time and consideration to the implications of allowing the provisions Section 272 to sunset, or even to implement a less robust set of safeguards in their place. As an interim step, the Commission should extend the application of the current rules to Verizon in New York pending the outcome of this rulemaking. The Commission should spend more than five months considering the comments in this docket and preparing an order.

In fact, the need to avoid making a hasty decision on the continuation of Section 272 is exacerbated by the fact that members of the public, including CompTel, are materially impaired in their ability to file comments in this rulemaking. This is because the Commission has not released an unredacted copy of the *Report of Independent Accountants on Applying Agreed-Upon Procedures*, prepared by Ernst & Young, LLP and filed on December 17, 2001 (“SBC Section 272 Biennial Audit Report”). As stated in our recent letter to the Commission,¹ CompTel believes that SBC’s unilateral redactions do not comply with the requirements of the statute and the FCC’s recent Order concerning *Verizon’s Section 272 Biennial Audit Reports*, wherein the Commission found that Verizon must make available a complete report for “public inspection.”² In fact, CompTel uses the results of the *Verizon Section 272 Biennial Audit Reports* to inform these comments,³ particularly in response to the Commission’s directive that, “To the extent commenters recommend that the Commission consider BOCs’ actual behavior in terms of cost misallocation or other discriminations, *what evidence is there of such behavior and on what evidence should the Commission rely?*”⁴ Without the ability to review the unredacted *SBC Section 272 Biennial Audit Report*, CompTel will not have access to all available evidence that could support a more complete response to the

¹ Letter from H. Russell Frisby, Jr., President, CompTel, to Michael K. Powell, Chairman, Federal Communications Commission, July 30, 2002.

² *In the Matter of Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, Memorandum Opinion and Order, CC Docket No. 96-150 (rel. Jan. 10, 2002). (“*Verizon Disclosure Order*”)

³ See *infra* at 10-11, 13 and 19.

⁴ *Notice of Proposed Rulemaking* at ¶ 15. (emphasis added)

Commission's questions.

In fact, as stated in our July 30 letter, CompTel is perplexed by the Wireline Competition Bureau's recent Order rejecting CompTel's request for an extension of the filing deadline in this rulemaking.⁵ Specifically, CompTel asked the Commission to extend the filing deadline until two weeks after SBC files a complete Section 272 Biennial Audit Report, due to the impairment caused by our inability to review complete audit results. The Bureau rejected CompTel's request and granted a two-week extension instead based on "the need to develop a record in this proceeding in advance of the statutory sunset date."⁶ The Commission's commitment to address the elimination of the Section 272 Safeguards within the next five months⁷ is troubling, given its apparent unwillingness to address the simple confidentiality issues raised by the *SBC Section 272 Biennial Audit Report* over the past six months. Therefore, CompTel urges the Commission to withhold judgment in this rulemaking until the public has a meaningful opportunity to review all of the information that could rationally inform its comments, notably the *SBC Section 272 Biennial Audit Report*.

Further, in this rulemaking, the Commission should explicitly state – yet again – that RBOCs must publicly file unredacted biennial audit reports to comply with the plain language of Section 272(d)(2). Though the Commission made this point clear in the

⁵ *Id.*, Order, DA 02-1741 (WCB rel. July 18, 2002).

⁶ *Id.*

⁷ Under Section 272(f)(1), the provisions of Sections 272(a), (b), (c) and (e)(2) and (e)(4) will sunset in the State of New York in December 2002 absent Commission action.

Verizon Disclosure Order, SBC recently flouted the statute and the Commission's Order when it filed its own heavily redacted Section 272 Biennial Audit Report for the State of Texas. Competitors should not need to ask the Commission to comply with the clear-cut requirements in the Act and Commission orders every time an RBOC files an unsupported request for confidentiality. Indeed, without strong language condemning this process and a swift response from the Commission, the FCC will effectively sanction the RBOCs' continued redactions to critical information in their Section 272 Biennial Audit Reports, thereby permitting the RBOCs to circumvent the statutory requirements of Section 272(d)(2). Requiring competitors to fight for their statutory right to this information also needlessly increases regulatory costs for the parties that can least afford to expend limited resources on this effort but could most benefit most from public disclosure of this information.

Similarly, the Commission should seek comment on the results of *all* Section 272 Biennial Audit Reports, a practice which, while compelled by statute, the Commission appears to have ended.⁸ First, the Commission should seek comment on the audit results from interested parties, particularly competitive carriers that may have been harmed by any violations described in the audit report, to better understand the degree of harm imposed by these violations. Indeed, without such input, the Commission will base any enforcement action on information provided from the independent auditor and the RBOC,

⁸ Interestingly, the Commission has not sought comment on the results of the *SBC Section 272 Biennial Audit Report*. The Commission previously sought comment on *Verizon's Section 272 Biennial Audit Reports*, which were the first such audit reports to be filed with the Commission.

not the parties whom the statutory provisions are designed to protect. Second, public comments on the audit reports will allow the Commission to fine-tune future audit procedures and guidelines. For example, in their comments on the *Verizon Section 272 Biennial Audit Report*, both AT&T⁹ and WorldCom¹⁰ point out that the audit results are deficient because they do not evaluate Verizon's provision of special access to itself (i.e., the Verizon ILEC's retail customers), only Verizon's provision of special access to its Section 272 affiliates.¹¹ As described in those comments and CompTel's comments in the *Special Access Rulemaking*,¹² an RBOC's provision of special access services to its retail customers relative to its provision of these services to its wholesale customers must be evaluated, because the RBOC has a significant incentive to discriminate against non-affiliated carriers to provide its retail division with a competitive advantage. Unfortunately, without such comment on the Section 272 Biennial Audit Reports, the Commission will not obtain feedback that could make its future audit programs more effective.

⁹ *Notice of Ex Parte Communication*, Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, May 23, 2002 (describing AT&T's comments on the *Verizon Section 272 Biennial Audit Reports* and suggesting improvements to the Section 272(d) audit process).

¹⁰ WorldCom comments at 7-8.

¹¹ *Verizon Section 272 Biennial Audit Reports*, Appendix A, Table 14a.

¹² *Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, CC Docket No. 01-321, (rel. Nov. 19, 2001). ("Special Access Rulemaking")

I. THE RBOCS CONTINUE TO LEVERAGE THEIR POWER IN THE LOCAL MARKET TO GAIN ADVANTAGES IN THE LONG DISTANCE MARKET

In the *Notice of Proposed Rulemaking*, the Commission asks the threshold question of on what basis, if any, should the Commission extend the requirements of Section 272. The Commission specifically asks for evidence of ongoing discrimination to justify the continued application of any competitive safeguards to an RBOC three years after the RBOC enters the long distance market.

CompTel urges the Commission to extend the existing requirements, with some clarifications, based on the RBOCs' continuing abuse of their power in the local market to gain competitive advantages in the long distance market. As described herein, the RBOCs have been found to discriminate against competitive carriers by several state public utility commissions and the Commission's own Section 272 Biennial Audit Reports. Moreover, RBOC anti-competitive behavior has increased, both in frequency and magnitude, once the RBOC has obtained permission to provide in-region interLATA services pursuant to Section 271. In other words, the need for the structural separation, nondiscrimination, and reporting safeguards in Section 272 actually has increased over time, justifying a three-year extension of these requirements.

A. Special Access Performance Has Declined as the RBOCs Have Entered the Long Distance Market

The need for the nondiscrimination safeguards in Sections 272(c) and 272(e) are greater as RBOCs are permitted to enter the market for in-region interLATA telecommunications services. This is because after Section 271 approval, the RBOCs can

compete for lucrative enterprise customers who previously could only obtain many private line services from competitive access providers (“CAPs”) or interexchange carriers (“IXCs”) due to the interLATA restrictions placed on the RBOCs. Thus, the RBOCs now have an even greater incentive to provide inferior provisioning or maintenance and repair services to wholesale consumers of special access circuits, thereby creating an artificial competitive advantage as the RBOCs market their superior quality special access services to retail customers or their Section 272 affiliates.

Competitor concerns about RBOC special access discrimination are founded on fact. A number of competitors and state public utility commissions have documented a recent decline in RBOC special access service quality despite the fact that the RBOCs have more than 20 years of experience provisioning special access circuits.

For example, the New York Public Service Commission (“NYPSC”) has found that Verizon’s special access provisioning performance in New York is significantly below the NYPSC’s service quality standards, and suggests that “Verizon treats other carriers less favorably than its retail customers” regarding the provisioning of special access services.¹³ These findings are based on hearings, testimony and a robust evidentiary record, so they should be taken very seriously by the Commission. In fact, the NYPSC was so concerned about the economic and competitive impacts of Verizon’s

¹³ New York Public Service Commission, *Opinion and Order Modifying Special Services Guidelines for Verizon New York, Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, Case Nos. 00-C-2051, 92-C-0665 (June 15, 2001) at 5 (finding that Verizon meets only 76 percent of its provisioning appointments for wholesale customers, compared to 96 percent for its retail customers). (“NYPSC Special Access Order”)

poor special access performance that it asked the Commission to provide assistance in improving the quality of special access services in New York.¹⁴ In the meantime, the NYPSC has required Verizon to report performance data on all special access circuits ordered from Verizon to ensure that the RBOC's performance does not decline even further. Based on similar degradations in Verizon's special access performance, the Massachusetts Department of Telecommunications and Energy has required Verizon to report performance data for interstate special access and intrastate special access.¹⁵ Similarly, the Minnesota Public Utilities Commission has found a "clear need for further investigation, careful monitoring, and potentially, wholesale access service quality standards for US WEST..." based on its own state investigation into problems associated with Qwest's provision of special access services.¹⁶

This Commission likewise has obtained evidence of RBOC discrimination in the provision of special access services. The *Verizon Section 272 Biennial Audit Reports* for the State of New York, which were filed more than one year ago, indicate that Verizon has violated the nondiscrimination requirements of Sections 272(c)(1) and 272(e)(1) of the Act. Table 14a of the audit reports indicates that the average installation interval for

¹⁴ Letter from Maureen O. Helmer, Chairman, New York Public Service Commission, to Michael K. Powell, Chairman, FCC, May 22, 2001.

¹⁵ *Investigation by the Department of Telecommunications and Energy on its Own Motion Pursuant to G/L. c. 159 §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts Provision of Special Access Services*, DTE 01-34, at 12 (August 19, 2001).

¹⁶ *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against US WEST Communications, Inc. Regarding Access Service*, Docket No. P-421/C-99-1183 at 15 (August 15, 2000).

special access services provided to Verizon long distance affiliates was shorter than the “non-affiliate” interval in seven of the nine months covered by the audit report.¹⁷ More troubling is the fact that Table 14a also indicates that Verizon’s provisioning of special access services to competitors deteriorated after Verizon was granted Section 271 approval. For example, the average installation interval for special access services provided to non-affiliated carriers increased from 19 days in January 2000 to 29 days in July 2000. Unfortunately, as referenced above, the *Verizon Section 272 Biennial Audit Reports* are deficient because they do not evaluate Verizon’s provision of special access to itself (i.e., Verizon retail customers), only the provision of special access to Verizon’s Section 272 affiliates. Given Verizon’s incentive to provide superior special access services to its own retail customers, which is supported by the findings of the NYPSC, the *Verizon Section 272 Biennial Audit Reports* might not demonstrate the true magnitude of Verizon’s Section 272 violations, because they only examine the Verizon ILEC-to-affiliate relationship. Further, SBC redacted the special access performance results from the Section 272 Biennial Audit Report that it publicly filed with the Commission on December 11, 2001, and the FCC has yet to comply with the statutory mandate in Section 272(d)(2) by releasing a copy of the unredacted report. As such, CompTel and other members of the public cannot comment on SBC’s audit results, even though, based on commercial experience, we believe the SBC audit report will show similar

¹⁷ *Verizon Section 272 Biennial Audit Reports.*

discrimination.¹⁸

B. RBOCs Process Primary Interexchange Carrier Changes in a Discriminatory Manner

In addition to providing its retail division and long distance affiliates with superior special access performance, Verizon also has been found to process primary interexchange carrier (“PIC”) changes in a manner that provides Verizon’s Section 272 affiliates with a competitive advantage over non-affiliated IXC’s. Verizon’s dual role as an IXC and the administrator of all PIC change requests creates a conflict of interest that provides Verizon with an incentive to abuse its gatekeeper role. Stated simply, Verizon has an incentive to retain customers by making the PIC change process more cumbersome and difficult. Such behavior clearly violates the provisions of Sections 272(c)(1) and 272(e)(1) of the Act.

In fact, in March 2001, the NYPSC issued a Show Cause Order that initiated an investigation into the manner in which Verizon processes PIC changes. The Commission stated that now that Verizon has entered the interLATA market and uses its personnel in

¹⁸ For example, SBC claims that it should not be required to publicly report special access performance data for its affiliate, because “meaningless variances due to the large number of orders (or troubles) could have unnecessary negative consequences for SBC and may result in unnecessary and unjustified concern on the part of non-affiliated entities as well as other parties (e.g., regulators).” Comments of SBC Communications, CC Docket No. 96-150, Attachment at 4 (March 19, 2002). If *SBC’s Section 272 Biennial Audit Report* showed that SBC provided its non-affiliated wholesale customers with the same or better treatment than its Section 272 affiliates, CompTel questions SBC’s need to redact such information from the audit report. Alternately, if the report does in fact show that the Section 272 affiliates are receiving better treatment than non-affiliated carriers, CompTel questions the Commission’s decision to withhold this data from the parties who have been harmed by this discriminatory behavior.

a blended effort to sell intraLATA and interLATA services, “a system based on Verizon as the freeze gatekeeper may no longer be appropriate. Rather, a more neutral system should be considered.”¹⁹

CompTel applauds the NYPSC’s decision to investigate Verizon’s PIC change processes, particularly given that *Verizon’s Section 272 Biennial Audit Reports* for the State of New York illustrate that Verizon processes PIC changes faster for its Section 272 affiliates than for non-affiliated carriers. Specifically, the audit reports show that Verizon processed PIC changes more rapidly for its own affiliates every month between May and September 2000.²⁰ Similarly, Verizon also has been fined \$27,000 by the Pennsylvania Public Utility Commission (“PaPUC”), after a commission investigation found that Verizon failed to lift customer preferred carrier freezes in a timely manner.²¹ According to the PaPUC, “An incumbent local exchange carrier’s failure to lift a service carrier freeze in a timely manner, even if its actions are unintentional, can have grave consequences in an incipient competitive market for local telephone service by discouraging consumers from shopping for a new provider.”²² It is quite clear that

¹⁹ *Complaint and Petition for an Audit and Investigation of Bell Atlantic Practices Employed to Place and Lift Preferred Carrier Freezes, For an Order Directing Modifications of the Systems and Practices, and For Sanctions*, Cases No. 00-C-897, 00-C-0188, 87-C-8425, 92-C-0665, 95-C-0154, and 95-C-0650 (March 2, 2001).

²⁰ *Verizon Section 272 Biennial Audit Reports*, Appendix A, Table 14c.

²¹ *Pennsylvania Public Utility Commission v. Verizon*, Tentative Order, Docket No. M-00021592 (Jan. 24, 2002) *aff’d* by Final Order, May 23, 2002.

²² *Id.* at 6.

Verizon is using the PIC change process to retain or even win long distance customers for its Section 272 affiliates in clear violation of the nondiscrimination requirements in Sections 272(c) and (e) of the Act.

C. RBOCs Have Engaged in Illegal Tying Arrangements

On June 14, 2002, Bell South Interconnection Services, which is BellSouth's wholesale organization, issued a Carrier Notification Letter to competitive providers of local exchange services stating that it would not process Local Service Requests ("LSRs") submitted by carriers that do not have an operational agreement with BellSouth Long Distance.²³ As stated in the letter, BellSouth's wholesale organization will not process orders for unbundled network elements ("UNEs"), the unbundled network element platform ("UNE-P"), or resale services if the UNEs or resold services would be used to provide local service to an end user customer currently obtaining long distance services from BellSouth Long Distance.²⁴ In effect, BellSouth is utilizing its control over UNEs and resold services to strong-arm competitive carriers into entering into operational agreements with BellSouth's Section 272 long distance affiliate. This is particularly egregious, given that BellSouth Long Distance has notified competitors that it will take a *minimum* of 60 to 90 days to negotiate an operational agreement.²⁵

²³ Carrier Notification SN1083138, BellSouth Interconnection Services, June 14, 2002. CompTel has attached a copy of this letter to these comments.

²⁴ *Id.*

²⁵ Letter from Janet A. Kibler, AVP-Planning and Development, BellSouth Long Distance, to Page Miller, Director-Carrier Relations, Talk America, July 22, 2002. As stated in the letter, developing an operational agreement could take

BellSouth's policy constitutes an illegal tying arrangement that permits BellSouth to use its near-monopoly power in the local market to ensure the financial well-being of its Section 272 affiliate, BellSouth Long Distance. In contrast, non-affiliated long distance carriers would not be able to withhold critical inputs in the local market—specifically UNEs and resold services—to extort an operational agreement from consumers of these facilities and services. As such, BellSouth's tying arrangement is an example of the very behavior that the separate affiliate requirement in Section 272(a) and the structural and transactional requirements in Section 272(b) are meant to detect and deter.

Moreover, this tying arrangement violates Section 272(e)(1), which requires the RBOC to “fulfill requests for telephone exchange service or exchange access within a period no longer than the period in which it provides telephone exchange service and exchange access to itself or to its affiliates.” Clearly, BellSouth is discriminating in the provision of telephone exchange service, because it does not require its own retail division to negotiate an operating agreement with BellSouth Long Distance. Further, this behavior constitutes a clear violation of Section 272(b)(5), which requires BellSouth

much longer. “[BellSouth Long Distance] expect[s] that it will be at least 60 to 90 days before we will be able to provide service to CLEC end users and, even then, we may not be able to provide more than a limited number of offerings. We also expect constraints on our ability to interface mechanically with CLECs for some period of time. We are continuing to develop additional options, but *we do not yet have an estimated availability date for these alternatives.*” (emphasis added) See also Letter from Janet A. Kibler, AVP–Planning and Development, BellSouth Long Distance, to Peggy D. McKay, Director of Product Management, Momentum Business Solutions, Inc., July 18, 2002. CompTel has attached copies of these letters to these comments.

Long Distance to conduct all transactions with the RBOC on an arm's length basis and reduce such transactions to writing. Indeed, CompTel is not aware of any affiliate contract between BellSouth Interconnection Services and BellSouth Long Distance that allows the former to withhold UNEs and resold services from non-affiliated local carriers to ensure payment to the latter.

II. EVIDENCE OF RBOC NONCOMPLIANCE WITH THE REQUIREMENTS OF SECTION 272 JUSTIFIES THE CONTINUED APPLICATION OF THESE REQUIREMENTS BEYOND THE STATUTORY SUNSET PERIOD

Based on the RBOCs' anti-competitive behavior and noncompliance with Section 272, as described herein, CompTel urges the Commission to extend the requirements of Section 272 beyond the three-year sunset deadline imposed by Section 272(f)(1). CompTel does not believe it is appropriate to implement a lesser or different set of competitive safeguards at this time; instead, the Commission should strengthen the existing requirements by tracking the RBOCs' provision of special access services to retail customers under Section 272(e)(1), and ensure greater public access to the biennial audit reports required by Section 272(d). While CompTel explains the need for some of these specific statutory requirements in the comments that follow, CompTel supports the continuation of *all* of the provisions in Section 272 for an additional three years beyond the current deadline imposed by Section 272(f)(1).

A. **The Separate Affiliate Requirement in Section 272(a) and the Structural and Transactional Requirements in Section 272(b) Facilitate the Detection of Discrimination**

First and foremost, the Commission should not eliminate the separate affiliate requirement imposed by Section 272(a) or the structural and transactional requirements imposed by Section 272(b). The existence of the separate affiliate makes it possible for competitors to monitor the RBOCs' compliance with the nondiscrimination safeguards in Sections 272(c) and 272(e), as well as identify the root cause for any preferential treatment obtained by the separate affiliate.

In fact, eliminating the separate affiliate and the structural and transactional safeguards might actually subject the RBOCs to a greater number of accusations of discrimination in the provision of services and facilities. For example, the current Section 272(d) biennial audits evaluate an RBOC's interaction with its long distance affiliate relative to non-affiliated carriers. In other words, the audits evaluate two distinct, but similar, wholesale relationships: (1) the relationship between the RBOC and the Section 272 long distance affiliate and (2) the relationship between the RBOC and non-affiliated carriers. The audit reports do not evaluate the relationship between the long distance affiliate and the affiliate's retail customers. If the requirements of Sections 272(a) and 272(b) were eliminated, and the RBOC were allowed to subsume its Section 272 long distance affiliate, then any audit under Section 272(d) would necessarily evaluate the RBOC's provision of goods and services to its own retail long distance customers relative to its interactions with its wholesale customers/competitors. This would lead to a less

accurate comparison than is available today, because the audit would measure RBOC retail vis-à-vis RBOC wholesale to non-affiliated wholesale customers/competitors.

Problems would arise if the RBOC was in fact a more efficient retailer of long distance services than non-affiliated competitors. In other words, simply measuring the performance of the integrated RBOC's retail long distance division could make the superior performance of the retail division appear to be the result of preferential wholesale treatment that violates Sections 272(c) and 272(e), when these results really demonstrate well-earned superior performance by the retail marketing group. In contrast, maintaining the requirements of Sections 272(a) and 272(b) limits any evaluation to an RBOC's wholesale interactions with its affiliated long distance provider relative to non-affiliated wholesale customers/carriers, so the Commission can truly isolate only illegal discrimination that violates Sections 272(c) or 272(e). Thus, the separate affiliate makes it easier for regulators, competitive carriers and other interested parties to identify the root cause of any discriminatory treatment.²⁶ At the same time, the Commission would not be removing any incentive for the RBOC affiliate to become a more efficient retail competitor.

²⁶ For example, the existence of the structural separation requirement in Section 272(a) has made it possible for competitive carriers participating in the NYPSC's PIC change investigation to isolate the cause of Verizon's superior PIC change processing for its Section 272 long distance affiliate relative to non-affiliated carriers, as illustrated by the *Verizon Section 272 Biennial Audit Reports*. Specifically, Verizon provides its Section 272 long distance affiliate with access to the same system used by its retail sales force to process PIC changes, whereas non-affiliated carriers are forced to use a different system with inferior functionalities and more limited availability.

Moreover, CompTel believes that it would be very difficult, if not impossible, to detect any cross-subsidization of the RBOC's retail long distance services without mandating a continuation of the separate affiliate and the structural and transactional safeguards. Even if the Commission were predisposed toward permitting the requirements of Section 272 to expire, Section 272(e)(3) would still remain in place. Section 272(e)(3) requires the RBOC to "impute to itself . . . an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service."²⁷ Imputation tests are very difficult to employ, and this reality is made even more difficult given the Commission's decision to eliminate or simplify many of its existing accounting rules.²⁸ In short, besides making it easier to detect discriminatory performance, the maintenance of the separate affiliate also facilitates detection of discriminatory transactions, thus ensuring compliance with accounting safeguards.

B. The Commission Should Retain and Clarify Section 272(d)'s Audit Requirement

RBOC discrimination in the provision of special access services is a serious problem for competitive carriers specifically and the nation's economic well-being generally. Economic and other practical considerations make it impossible for

²⁷ 47 USC 272(e)(3).

²⁸ *In the Matter of 2000 Biennial Regulatory Review—Comprehensive Review of the Accounting Requirements for Incumbent Local Exchange Carriers: Phase 2*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 00-199 (rel. November 5, 2001).

competitors and large telecommunications consumers to rely solely on non-incumbent networks to provide special access circuits. As such, RBOC special access services are critical components to the national telecommunications networks that carry vast amounts of data and voice traffic. Indeed, based on its investigation into this issue, the NYPSC concluded that special access services are critical to the health of the “new economy,” making it essential to regulate Verizon’s lingering “last mile” monopoly.²⁹

While the nondiscrimination requirements of Section 272(e)(1) will survive without Commission intervention, the biennial audit requirement of Section 272(d) will not. It is true that, notwithstanding the requirements of Section 272(e)(1), RBOCs have a general obligation not to discriminate in their provision of services under Section 201 of the Act. However, a general nondiscrimination obligation without monitoring and reporting will not adequately protect competitors that lack market power from the RBOCs’ anti-competitive behavior. Without data on the RBOCs’ special access performance, competitors cannot request appropriate enforcement action from state and federal regulators or the courts. This is precisely why the industry asked the Commission to initiate an investigation into national performance measures for special access services. Currently, without such performance measures, the Section 272(d) Biennial Audits are the only publicly available source of data on RBOC special access performance.

In fact, the need for special access performance data is a compelling, but not the only, reason to maintain the Section 272(d) audit requirement. *Verizon’s Section 272*

²⁹ *NYPSC Special Access Order.*

Biennial Audit Reports show a number of violations of Section 272 and the FCC's affiliate transaction rules in areas other than special access, including discriminatory processing of PIC changes;³⁰ provision of operator services and security escort services by affiliate employees to the RBOC during a strike, without complying with the Commission's affiliate transaction rules;³¹ a failure to carry out the fully distributed cost ("FDC")/fair market value ("FMV") comparison required by the Commission's affiliate transaction rules;³² and, a failure to post information concerning affiliate transaction requirements on the Internet in an accurate and timely manner.³³ Absent the biennial audit reports, interested parties, including state and federal regulators and competitive carriers, most likely would not be able to detect the RBOCs' noncompliance with the statute and the Commission's implementing rules and orders.

III. THE COMMISSION SHOULD PRESERVE THE REQUIREMENTS OF SECTION 272 IN ALL STATES FOR A MINIMUM OF THREE YEARS

In these comments, CompTel has described a pattern of significant anti-competitive behavior by the RBOCs after they have received authority to provide in-region interLATA services pursuant to Section 271. For example, in New York, the first state in which an RBOC obtained Section 271 authority, both the NYPSC and this Commission have sufficient evidence demonstrating that Verizon discriminates in its

³⁰ *Verizon Section 272 Biennial Audit Report*, Appendix A, Table 14c.

³¹ *Id.*, Appendix A, Tables No. 1 and 7.

³² *Id.*, Appendix A at 21. Of course, CompTel cannot meaningfully comment on the SBC audit results because critical information has been redacted from the report that the Commission has made available to interested parties.

³³ *Verizon Section 272 Biennial Audit Reports*, Appendix A at 16 and 17.

provision of special access services and the processing of PIC changes. Based on these abuses, the NYPSC imposed special access performance measures and reporting requirements on Verizon and mandated revisions to the manner in which Verizon processes PIC changes. In BellSouth's in-region states, the RBOC immediately conditioned the availability of UNEs and resold services to a competitor's agreeing to provide billing services for BellSouth's Section 272 long distance affiliate, despite the fact that BellSouth's incumbent local exchange carriers are not compelled to provide billing services to unaffiliated interexchange carriers. This tying arrangement prevents competitive local exchange carriers from serving a local customer until the competitor agrees to bill for long distance services provided by BellSouth's Section 272 affiliate.

CompTel believes this pattern of behavior justifies a three-year extension of the requirements of Section 272 to all RBOCs in all states. The RBOCs have not lost enough local market power to prevent these abuses. To wit, some of the most significant violations have been identified in New York, where competitors serve a greater percentage of retail customers than in any other state.³⁴ Further, the Commission's failure to address the violations described in the *Verizon Section 272 Biennial Audit Reports*, despite the fact that the audit reports were filed more than one year ago and the data is at least 18 months old, provides CompTel no assurance that the Commission could formulate or would enforce a lesser set of safeguards, or the sunset of the existing

³⁴ *Local Telephone Competition: Status as of December 31, 2001*, Federal Communications Commission, July 23, 2002 (data current through December 31, 2001).

standards in a shorter period of time. Indeed, the Commission's inability to release an unredacted version of *SBC's Section 272 Biennial Audit Report* notwithstanding the passage of six months and the precedent of the Verizon Disclosure Order fails to assure CompTel that the Commission will protect competitors from RBOC abuses, absent a continuation of these safeguards. Instead, it seems more likely that the statutory deadline in Section 272(f)(1) will expire in New York before the Commission ever sanctions Verizon for the violations described in its *Section 272 Biennial Audit Reports* for that state.

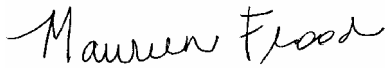
In summary, the RBOCs' ongoing noncompliance with the requirements of Section 272, and their general abuse of their market power, warrant the continuation of the separate affiliate, structural/transactional, nondiscrimination and audit requirements in Section 272 for an additional three years beyond the date that such requirements would otherwise sunset pursuant to Section 272(f)(1). Without the continuation of these statutory safeguards, CompTel has no basis to believe that the Commission can or will prevent competitors from falling victim to RBOC abuses on a prospective basis. Therefore, we simply ask the Commission to maintain the requirements of Section 272 so that competitive carriers may use the results of future Section 272 biennial audits in any forum in which an aggrieved carrier may obtain that relief, including state public utility commissions and the courts.

IV. CONCLUSION

The Commission should extend the provisions of Section 272 beyond the three-

year sunset deadline in Section 272(f)(1) for an additional three years beyond the date that the RBOC is authorized to provide in-region interLATA telecommunications services. The Commission should also immediately make an unredacted copy of the *SBC Section 272 Biennial Audit Report* publicly available. Finally, the Commission should provide interested parties with an opportunity to review the *SBC Section 272 Biennial Audit Report* and supplement the record in this proceeding with their analysis of the audit results.

Respectfully submitted,

By: 

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August 5, 2002

BellSouth Interconnection Services

675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification**SN91083138**

Date: June 14, 2002

To: All BellSouth Interconnection Services' Customers

Subject: All BellSouth Interconnection Services' Customers – Guidelines for use of Uniform Service Order Codes (USOC), Primary Interexchange Carrier (PIC) and Local Primary Interexchange Carrier (LPIC) Associated with BellSouth Long Distance

This is to advise that the following USOCs, PIC and LPIC associated with BellSouth Long Distance will not be valid on any Interconnection Resale and Unbundled Network Elements (UNE) and Unbundled Network Elements-Platform (UNE-P) orders where the submitting carrier does not have an operational agreement with BellSouth Long Distance:

- **PIC = 0377**
- **LPIC = 0377**
- **USOCs = BSL++, BSFPF, B3FSB, B3FCX, BTFA+, BFN++, BSXBR, BSXBU, BSXRR, BSXRU, BSXR1, BSXB1**

If these USOCs/PIC/LPIC are submitted with any Local Service Request (LSR) and there is no operational agreement with BellSouth Long Distance, the LSR will be returned to the carrier for clarification.

If you have any questions, please contact your BellSouth Local Support Manager.

Sincerely,

ORIGINAL SIGNED BY JIM BRINKLEY

Jim Brinkley – Senior Director
BellSouth Interconnection Services

July 22, 2002

Dear Ms. Miller:

I received your email regarding an operational agreement with BellSouth Long Distance. I want to bring you up to date on our progress in developing the business and technical requirements that will be necessary to provide BSLD services to your end users.

BSLD is continuing to review the business and technical requirements to support the provision of its services to CLEC end users. Our findings to date indicate that most CLECs cannot or do not make available to IXCs the broad range of services needed by BSLD to provide service to the end users of those CLECs. For example, we are finding that many CLECs do not offer billing and collection services. As an alternative, when we considered using our existing clearinghouse vendor, we found that many (if not most) CLECs do not have standing arrangements with this vendor. In addition, it is also our understanding that CLECs currently have no way of providing CARE information to BSLD in a format that will allow us to provide service to their end users. As a result of these and other issues, BSLD must create a variety of new processes to enable it to provide any services to CLEC end users.

Because of the unanticipated initial interest in obtaining BSLD services for CLEC end users, we are actively reviewing the work that must occur to allow this to happen. Because of the extensive scope of work that will need to take place, we expect that it will be at least 60 to 90 days before we will be able to provide service to CLEC end users and, even then, we may not be able to provide more than a limited number of offerings. We also expect constraints on our ability to interface mechanically with CLECs for some period of time. We are continuing to develop additional options, but we do not yet have an estimated availability date for these alternatives.

You can help us finalize our initial and future phases of availability by completing the attached questionnaire and returning it to me by August 2, 2002.

Sincerely,

Janet A. Kibler
AVP – Planning and Development
BellSouth Long Distance

Attachment

BellSouth Long Distance, Inc.

CLEC Questionnaire

1. Please provide your national CLEC name.
2. Please provide your national CLEC ID.
3. Please provide your Regional Accounting Code(s).
4. List the states where your CLEC has a presence. For each state where your CLEC has a presence, describe whether it is within the BellSouth Telecommunications (BST) service area or outside or both. If outside the BST service area, please provide the name of the ILEC(s).
5. Is your CLEC switched (facilities) based, a reseller or a UNE-P user? If your CLEC provides service using a combination of serving platforms, list the serving platform (i.e., facilities based, resale or UNE-P) by service area (LATA, NPA/NXX, CLLI).
6. In areas where your CLEC uses a facilities based platform, does your CLEC support local number portability (LNP)?
7. In areas where your CLEC is a Facilities Based Provider, does your CLEC support Equal Access in all areas? If the answer is no, please provide the planned date for support of Equal Access capability by service area (LATA, NPA/NXX, CLLI).
8. In areas where your CLEC is a Facilities Based Provider, does your CLEC always connect (trunk) to the ILEC's Access Tandem for connection to IXC's? If the answer is no, please describe how your CLEC currently interconnects with IXC's (describe by LATA, NPA/NXX, CLLI).
9. What is the earliest date that BellSouth Long Distance (BSLD) can start sending InterLATA PIC orders to your CLEC?
10. What is the earliest date that BSLD can expect to receive CARE records from your CLEC?

BellSouth Long Distance, Inc.

CLEC Questionnaire

11. Provide the CARE Transaction Codes and Service Indicators that your CLEC currently supports when sending CARE records to IXCs.
12. Provide the CARE codes currently accepted by your CLEC to exchange data for PIC orders.
13. Will the BTN populated on the CARE record be actual phone number or account number format?
14. What "pub" indicators will your CLEC support?
15. Will your CLEC allow customers to choose separate IntraLATA and InterLATA carriers (2-PIC)?
16. Which of the following values does your CLEC currently use to forward data to BSLD?
 - BLANK: not multi-PIC
 - A: intraLATA
 - B: intraLATA/interLATA (international assumed)
 - E: InterLATA (international assumed)
17. What media do you presently use to transmit PIC orders? Paper, tape, fax, e-mail, electronic. If tape, provide specifications. If electronic, describe type of interface.
18. Will your CLEC be willing to use other media it currently does not use to transmit PIC orders? If so, please list the other media your CLEC is willing to use.
19. Provide name, street address, telephone number, fax number and e-mail address of CLEC contact for equal access policy and procedures.

BellSouth Long Distance, Inc.

CLEC Questionnaire

20. Provide name, street address, telephone number, fax number and e-mail address of CLEC contact for CARE handling and processing.
21. Provide name, street address, telephone number, fax number and e-mail address of CLEC contact where IXC CARE should be sent (if different from above).
22. Describe CLEC's current dispute resolution process for PIC changes and provide contact person, street address, telephone number, fax number and e-mail address.
23. Does your CLEC currently support three-way calling with IXC and end-user for PIC change requests?
24. What are CLEC's PIC change charges? Please provide tariff reference.
25. What are CLEC's PICC charges? Please provide tariff reference.
26. What are CLEC's Switched Access charges for origination and termination, if applicable? Please provide tariff reference.
27. Please provide a monthly estimate for the next 12-month period of CLEC customers that will select BSLD as their IXC for basic 1+ service. Provide separate estimates for residence customers, business customers with 3 lines or less, business customers with 4 to 10 business lines, business customers with 11 to 24 business lines, business customers with more than 24 lines.
28. Please provide a monthly estimate for the next 12-month period of CLEC customers that will select BSLD as their IXC for toll-free service. Provide separate estimates for business customers with 3 lines or less, business customers with 4 to 10 business lines, business customers with 11 to 24 business lines, business customers with more than 24 lines.
29. Please provide a monthly estimate for the next 12-month period of private lines purchased by CLEC's end users?

BellSouth Long Distance, Inc.

CLEC Questionnaire

30. Please provide a monthly estimate for the next 12-month period of Frame Relay drops purchased by CLEC's end users?
31. Please provide a monthly estimate for the next 12-month period of Asynchronous Transfer Mode (ATM) drops purchased by CLEC's end users?
32. Does your CLEC plan to use BSLD as the exclusive IXC for 1+ services for CLEC's customers?
33. Does your CLEC plan to use BSLD for CLEC owned public telephones?
34. Does your CLEC currently provide Billing & Collection services to other IXCs? If so, please provide prices and a sample contract.
35. Does your CLEC currently have a contractual arrangement with a Clearing House? If so, please provide name(s).

July 18, 2002

Dear Ms. McKay:

I want to keep you apprised of our continued progress in developing the business and technical requirements that will be necessary to provide BSLD services to your end users.

BSLD is continuing to review the business and technical requirements to support the provision of its services to CLEC end users. Our findings to date indicate that most CLECs cannot or do not make available to IXC's the broad range of services needed by BSLD to provide service to the end users of those CLECs. For example, we are finding that many CLECs do not offer billing and collection services. As an alternative, when we considered using our existing clearinghouse vendor, we found that many (if not most) CLECs do not have standing arrangements with this vendor. In addition, it is also our understanding that CLECs currently have no way of providing CARE information to BSLD in a format that will allow us to provide service to their end users. As a result of these and other issues, BSLD must create a variety of new processes to enable it to provide any services to CLEC end users.

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Sincerely,

Janet A. Kibler
AVP – Planning and Development
BellSouth Long Distance

Attachment